Public Prosecutor v Resty Agpalo & Ors

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–82 OF 2005
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
2 DECEMBER 2010

B

Criminal Law — Penal Code — s 302 — Murder — Circumstantial evidence — Whether prima facie case established — Failure to produce important witnesses — Adverse inference — Whether statements made by absent witness inadmissible — Whether cumulative effect of evidence led to irresistible conclusion that accused caused death

C

D

Criminal Law — Penal Code — s 302 — Murder — Common intention — Whether proved — Whether prima facie case established — Failure to produce important witnesses — Adverse inference — Circumstantial evidence — Whether cumulative effect of evidence led to irresistible conclusion that accused caused death

E

Criminal Procedure — Appeal — Appeal against acquittal — Murder — Circumstantial evidence — Failure to produce important witnesses — Adverse inference — Whether statements made by absent witness inadmissible — Whether cumulative effect of evidence led to irresistible conclusion that accused caused death — Whether prima facie case established — Whether accused wrongly acquitted

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The three respondents were jointly charged with the murder of one Xu Jian Huang, an offence under s 302 of the Penal Code read together with s 34 of the same. According to the prosecution in its opening address, R1, on instruction of R2, had physically abused the deceased person for an alleged theft of RM30,000 from R2. These physical abuses were supposed to have been recorded in R1's mobile phone. The prosecution claimed that R1 had filed a police report as regards the theft and had extracted a written confession from the deceased. From 25 September 2004 until 27 September 2004 the deceased was supposed to have been tightly tied up, and later thrown into the swimming pool and drowned. The deceased was then brought to the hospital by R1 and two others. At the end of the prosecution's case the three respondents were acquitted. The prosecution appealed against the acquittal. The appeal against R2 was struck out as the prosecution failed to serve the relevant notices on him after many attempts. R2 was believed to be somewhere in China.

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Held, dismissing the appeal:

(1) Things did not go the way as promised or delineated in the opening

speech. An important witness one Mohd Razbean Mohd Tab failed to turn up. Exhibits that could help the prosecution were disallowed from being tendered. Without the help of Razbean, and without any direct evidence adduced to establish the common intention between R1 and R3 and the identity of the murderer, the prosecution's case weakened tremendously. What was left, in order to establish a prima facie case against them, in particular as to what happened on the material date and time, fell totally on circumstantial evidence. Much then depended on the testimony of one Subramaniam ('PW5') and eight pictures tendered as exh P50 (1–8) (see para 7).

(2) PW5's evidence was that he went to R2's house on 25 September 2004 and saw R2, a Chinese lady, and the deceased being tied up. He was informed by R1 that R2's house had been broken into and the burglar detained. PW5 could only tell the story as to what happened at R2's house on 25 September 2004 and not on the day when the 'homicidal drowning' happened ie on 27 September 2004. His evidence merely established that the deceased was tied up but still alive when seen by him (see para 8).

(3) P50 (1–8) were pictures of the deceased being tied up but still alive at the time when the images were taken. Further, no evidence was adduced by any of the prosecution's witnesses to establish when the deceased's pictures were taken and who took them (see para 9).

(4) The prosecution's attempt to tender the statements (ID127 and ID128) of Razbean recorded under s 112 of the Criminal Procedure Code, as he was nowhere to be found was correctly rejected by the trial judge. The prosecution failed to fulfil the prerequisites stipulated in s 32(1)(i) of the Evidence Act 1950. Further, there were discrepancies on the signatures in the statements (see para 11).

(5) There was also an obvious failure to call two other material witnesses ie Derwati and Fang Shu Jing, who were former employees who lived in the very house where the incident was alleged to have taken place. The failure of the prosecution to call important witness who might have possibly witnessed the murder and unfold the narrative of the prosecution's case, was fatal to the prosecution's case. An adverse inference was thus taken against the prosecution (see paras 16–17).

(6) The onus on the prosecution, when the evidence is of a circumstantial nature, is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient. The evidence, when taken together, did not irresistibly lead to the conclusion that R1 and R3 committed the offence. The prosecution had not proven a prima facie case (see paras 20–21).

[Bahasa Malaysia summary

Ketiga-tiga responden telah dituduh bersama dengan pembunuhan Xu Jian Huang, kesalahan di bawah s 302 Kanun Jenayah dibaca bersama s 34 Kanun Jenayah. Mengikut pihak pendakwaan ucapan pembukaannya, R1, atas arahan R2, telah mendera si mati secara fizikal untuk kecurian sebanyak RM30,000 yang didakwa daripada R2. Penderaan fizikal ini sepatutnya direkodkan di dalam telefon bimbit R1. Pihak pendakwaan mendakwa bahawa R1 telah memfailkan laporan polis berkaitan dengan kecurian tersebut dan telah mengekstrak pengakuan bertulis daripada si mati. Dari 25 September sehingga 27 September 2004 si mati dikatakan telah diikat dengan ketat, dan kemudiannya dibuang ke dalam kolam air dan telah lemas. Si mati kemudiannya telah dibawa ke hospital oleh R1 dan dua yang lain. Pada akhir kes pihak pendakwaan, ketiga-ketiga responden telah dibebaskan. Rayuan terhadap R2 telah dibatalkan memandangkan pihak pendakwaan gagal untuk menyampaikan notis-notis yang relevan kepadanya selepas mencuba beberapa kali. R2 dipercayai berada di China.

Diputuskan, menolak rayuan:

(1) Perkara tidak jadi mengikut apa yang dijanjikan atau digambarkan di dalam ucapan pembukaan. Seorang saksi penting Mohd Razbean Mohd Tab gagal untuk hadir. Ekshibit-ekshibit yang dapat membantu pihak pendakwaan tidak dibenarkan untuk dikemukakan. Tanpa pertolongan Razbean, dan tanpa keterangan langsung dikemukakan untuk membuktikan niat bersama di antara R1 dan R3 dan identiti pembunuh, kes pihak pendakwaan telah dilemahkan dengan teruk. Apa yang tinggal, untuk membuktikan kes prima facie terhadap mereka, terutamanya seperti apa yang terjadi pada tarikh dan masa material, bergantung sepenuhnya pada keterangan ikut keadaan. Kebanyakannya bergantung kepada kenyataan Subramaniam ('PW5') dan lapan gambar yang dikemukakan sebagai eksh P50 (1–8) (lihat perenggan 7).

(2) Keterangan PW5 adalah bahawa dia telah pergi ke rumah R2 pada 25 September 2004 dan melihat R2, seorang perempuan Cina dan si mati diikat. Dia telah diberitahu oleh R1 bahawa rumah R2 telah dipecah masuk dan pencuri telah ditangkap. PW5 hanya boleh memberitahu cerita tentang apa yang terjadi di rumah R2 pada 25 September 2004 dan bukan ada hari apabila 'homicidal drowning' terjadi iaitu pada 27 September 2004. Keterangannya hanya dapat membuktikan bahawa si mati telah diikat tetapi masih lagi hidup apabila dilihat olehnya (lihat perenggan 8).

(3) P50(1–8) merupakan gambar-gambar si mati yang diikat tetapi masih hidup pada masa gambar tersebut diambil. Selanjutnya, tiada keterangan

yang dikemukakan oleh mana-mana saksi pihak pendakwaan untuk membuktikan bila gambar si mati diambil dan siapa yang mengambilnya (lihat perenggan 9).

(4) Percubaan pihak pendakwaan untuk mengemukakan pernyataan-pernyataan (ID127 dan ID128) Razbean yang direkod di bawah s 112 Kanun Prosedur Jenayah, memandangkan dia tidak ditemui di mana-mana, telah ditolak dengan betul oleh hakim bicara. Pihak pendakwaan gagal untuk memenuhi syarat-syarat awal yang diperuntukkan di dalam s 32(1)(i) Akta Keterangan 1950. Tambahan, terdapat kepincangan pada tandatangan-tandatangan di dalam pernyataan-pernyataan tersebut (lihat perenggan 11).

(5) Terdapat juga kegagalan yang jelas untuk memanggil dua lagi saksi-saksi material iaitu Derwati dan Fang Shu Jing, yang mana merupakan bekas pekerja-pekerja yang tinggal di rumah di mana kejadian yang didakwa telah terjadi. Kegagalan pihak pendakwaan untuk memanggil saksi penting yang mana mungkin telah menyaksikan pembunuhan tersebut dan membongkar penceritaan bagi kes pendakwaan, adalah memudaratkan kepada kes pendakwaan. Inferens yang bertentangan justeru telah dibangkitkan terhadap pihak pendakwaan (lihat perenggan 16–17).

(6) Beban bagi pihak pendakwaan, apabila keterangan bersifat ikut keadaan, adalah sangat berat dan bahawa keterangan hendaklah secara mutlak menunjukkan kesimpulan tentang kesalahan tertuduh. Sekiranya terdapat jurang padanya oleh itu ianya tidak mencukupi. Keterangan tersebut, apabila diterima bersama, tidak secara mutlak membawa kepada kesimpulan bahawa R1 dan R3 telah melakukan kesalahan tersebut. Pihak pendakwaan tidak dapat membuktikan kes prima facie (lihat perenggan 20–21).]

Notes

For a case on appeal against acquittal, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 188.

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1698–1776.

Cases referred to

Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1, HC (refd)
Abdul Ghani bin Jusoh & Anor v PP [1981] 1 MLJ 25, FC (refd)
Chan Chwen Kong v PP [1962] MLJ 307, CA (refd)
Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232, FC (refd)
Jayaraman & Ors v PP [1982] 2 MLJ 306, FC (refd)
Kartar Singh & Anor v Rex [1952] MLJ 85 (refd)

Mat v PP [1963] MLJ 262, HC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169; [1991] 3 CLJ 169, SC (refd)
PP v Lam Peng Hoa & Anor [1996] 5 MLJ 50, HC (refd)
PP v Mohamed Said [1984] 1 MLJ 50, HC (refd)
PP v Norfaizal [2003] 8 CLJ 581, HC (refd)
PP v Sa'ari Jusoh [2007] 2 MLJ 409, FC (refd)
R v Abott [1955] 1 All ER 899 (refd)
Sim Tiew Bee v PP [1973] 2 MLJ 200, FC (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433, SC (refd)
Yaacob v PP [1966] 1 MLJ 67, FC (refd)

Legislation referred to

Evidence Act 1950 s 32, s 32 (1)(i)
Criminal Procedure Code ss 112, 118(1), 179(1)
Penal Code ss 34, 302

Appeal from: Civil Trial No 45–77 of 2004 and 45–80 of 2004 (High Court, Kuala Lumpur).

Ishak bin Mohd Yusoff (Attorney General Chambers) for the appellant.
Gobind Singh Deo (Gobind Singh Deo) for the first and third respondents.

Suriyadi JCA (delivering judgment of the court):

[1] Three persons viz Resty Agpalo ('the first respondent'), Koh Kim Teck ('second respondent'), and Mohamad Najib bin Zulkifli ('third respondent') were jointly charged with the murder of one Xu Jian Huang. At the end of the prosecution's case the three respondents were acquitted. The prosecution being dissatisfied then filed the notices of appeal. Before us we only heard the appeal against the first respondent ('R1') and the third respondent ('R3') as we had earlier struck out the appeal against the second respondent ('R2').

[2] The appeal against R2 was struck out as the prosecution failed to serve the relevant notices on him after many attempts. We were told that he was somewhere in China. After the striking out action we thenceforth moved on to hear the appeal against R1 and R3. With the appeal against R2 out of the way we found no basis or necessity to discuss in detail his involvement with R1 and R3. At the end of the appeal, we found no error in the High Court's order of discharge and acquittal of R1 and R3 at the end of the prosecution's case, and accordingly dismissed its appeal.

[3] The charge against R1 reads as follows:

> Bahawa kamu bersama dengan Mohamad Najib Bin Zulkifli (K/P: 800209-05-5439) di antara 26 September 2004, jam 11malam sehingga 27 September 2004 jam 330pagi, di rumah No 8 Jalam Mengkuang Off Jalan Ampang, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur, dan untuk mencapai niat bersama kamu, telah melakukan pembunuhan dengan menyebabkan kematian ke atas XU JIAN HUANG (Passport No.G 02882177) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dibacakan bersama s 34 Kanun yang sama.

[4] The charge against R3 reads as follows:

> Bahawa kamu bersama-sama dengan 1. Resty Agpalo, (KP: 721130-12-5013), (2) Koh Kim Teck (KP: 540311-01-5355) di antara 26 September 2004, jam 11malam sehingga 27 September 2004 jam 3.30pagi, di rumah No 8 Jalam Mengkuang Off Jalan Ampang, di dalam daerah Cheras, di dalam Wilayah Persekutuan Kuala Lumpur dan untuk mencapai niat bersama kamu, telah melakukan pembunuhan dengan menyebabkan kematian ke atas XU JIAN HUANG (Passport No. G 02882177) dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dibacakan bersama s 34 Kanun yang sama.

[5] The prosecution's case could only be satisfactorily gauged from the opening speech of the prosecution ie as to how it intended to establish a prima facie case, due to the insufficiency of evidence adduced in court. The prosecution began by stating that R1, R2 and R3 in furtherance of a common intention had committed murder from 26 September 2004 at 11pm to 27 September 2004 at 3.30am on the said Xu Jian Huang ('the deceased'). The prosecution planned to show that R1, on instruction of R2, had physically abused the deceased person for an alleged theft of RM30,000 from R2. These physical abuses were supposed to have been recorded in R1's mobile phone. Further the prosecution intended to adduce evidence to establish that the deceased person admitted finding only RM10,000 and had handed over that sum of money to R2. R1 thereafter had filed a police report as regards the theft. The prosecution too planned to adduce evidence to show that R1 had extracted a written confession from the deceased person. From 25 September 2004 until 27 September 2004 the deceased person was supposed to have been tightly tied up, and later thrown into the swimming pool and drowned. The prosecution would show that the deceased was brought to the hospital by R1 and two others. To do all the above the prosecution would call the necessary witnesses and buttressed further by exhibits.

[6] The opening address of the prosecution is relevant, as it will act as a guide for the prosecution, and it enables the court to react accordingly. In fact this speech is important as s 179(1) of the Criminal Procedure Code demands that

the officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused (*Public Prosecutor v Norfaizal* [2003] 8 CLJ 581; *Public Prosecutor v Sa'ari Jusoh* [2007] 2 MLJ 409). Even though a verdict may be founded on a basis not indicated in the opening speech, in order to avoid any accusation of any tactical disadvantage to the accused that may occasion a failure of justice, DPPs should ensure that much consideration be given to any opening speech.

[7] Regretfully for the prosecution here, in the course of the hearing things did not go the way as promised or delineated in the opening speech, as an important witness one Mohd Razbean Mohd Tab failed to turn up. Exhibits that could help the prosecution were disallowed from being tendered. Without the help of Razbean, and without any direct evidence adduced to establish the common intention between R1 and R3 and the identity of the murderer, the prosecution's case weakened tremendously. What was left, in order to establish a prima facie case against them, in particular as to what happened on the material date and time, fell totally on circumstantial evidence. Much then depended on the testimony of Subramaniam a/l P Sinnasamy ('PW5') and eight pictures tendered as exh P50 (1–8). These pictures are discussed below.

[8] We now discuss PW5's evidence upon which the prosecution's case tethered on. This person, a gardener who worked for R2, testified that R1 telephoned him to come to R2's house at the given address. He went to R2's house between 8pm to 8.30pm on 25 September 2004 on invitation of R1. In that house he saw R2, a Chinese lady, and the deceased being tied up. There he was informed by R1 that R2's house had been broken into and the burglar detained. PW5 even managed to communicate with the deceased but left thereafter. PW5, being the only witness who could tell the story as to what happened at R2's house on 25 September 2004, at best was a person who witnessed the scenario on that date, but not the day when the 'homicidal drowning' happened ie on 27 September 2004. His evidence merely established that the deceased was tied up but still alive when seen by him, and that R1, R2 and another Chinese lady were there. Nothing was said of R3.

[9] P50 (1–8) are exhibits and they comprised pictures of the deceased being tied up but still alive at the time when the images were taken. PW6, a PDRM forensic expert, conducted the extraction of all the images from P27 (a) ie a telephone, and printed them out. He testified that he conducted the examination of P27 (a) and extracted P50 on 26 September 2004 from it. We found that the pictures only exposed the manner how the deceased was tied but did not indicate who the murderer of the deceased was. Unfortunately no evidence was adduced by any of the prosecution's witnesses to establish when

A the deceased's pictures were taken and who took them. Those pictures could have been taken on the day when PW5 saw the deceased being tied up ie a couple of days before the death.

B **[10]** The above are the only facts adduced as regards the charges against them. Even though death was caused by homicidal drowning, as described by the doctor ('PW28'), there was no direct evidence to suggest that R1 and R3 committed the offence or had the common intention between them. Unless there was direct or circumstantial evidence adduced of their involvement with the death, the fact that it was homicidal-related was irrelevant.

C

[11] To overcome its shortcoming the prosecution attempted to tender the statements (ID127 and ID128) of Razbean recorded under s 112 of the Criminal Procedure Code of the Criminal Procedure Code, as he was nowhere to be found. The attempt to have it tendered was rejected by the learned judge D on several grounds. He found amongst others, that the prosecution failed to fulfil the prerequisites stipulated in s 32(1)(i) of the Evidence Act 1950, failed to take reasonable steps to ensure Razbean's attendance to give his evidence in court, failed to track down the material witness or at least put him under bond as per s 118(1) of the Criminal Procedure Code, and the signatures of Razbean E in ID127 were not the same with his signatures in ID128 A–D. ID 128 A–D is the supplement of ID 127. It was obvious to us that without ID127 and ID 128 the prosecution's position was untenable as without them there would be no evidence to support the prosecution's case against R3.

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[12] The court can admit ID 127 and ID 128 but the prerequisites demanded by the Criminal Procedure Code are stringent and cumbersome, and they must be overcome first. Any failure to satisfy those prerequisites will lead to the non-admission of the statements under s 32 of the Evidence Act G 1950 (*Sim Tiew Bee v Public Prosecutor* [1973] 2 MLJ 200, *Public Prosecutor v Mohamed Said* [1984] 1 MLJ 50, *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 50). We concluded that the learned judge committed no error when finding that the signatures of Razbean were different in ID127 and ID128 A–D. We too were satisfied that as there were discrepancies on the signatures there was every possibility that these documents were not his *(Allied* H *Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; *Abdul Ghani bin Jusoh & Anor v Public Prosecutor* [1981] 1 MLJ 25). The Federal Court in *Yaacob v Public Prosecutor* [1966] 1 MLJ 67 formulated the rule that the question of admissibility of evidence is for the judge, and having thoroughly scrutinised the notes of proceedings, we were satisfied that the rejection by the learned judge of I ID127 and ID 128 as exhs was correct as there was non-compliance of the legal prerequisites.

[13] The next question we asked ourselves was, even if ID127 and ID 128 A-D were tendered in court, would they be enough to call the defence, let alone at the defence stage find R1 and R3 guilty of the offence? With Razbean untested by cross-examination it would be difficult to determine whether he was a credible witness. The prosecution ventilated that the police had made several efforts to trace him but unsuccessful. On the other hand we have evidence adduced that he left his house in January 2005. The last call received by his wife (PW30) was on 12 July 2005, and she testified that her husband would not return until this case was over. In a gist the wife was in contact with him, perhaps knew his whereabouts, and even knew of his stance. His conduct in hiding from the trial already had turned him into a highly questionable character.

[14] We now touch on the last remaining issues. Even though R1 was identified as one of the three persons who sent the deceased to the Gleneagles Intan Medical Center, Ampang we easily concluded that that still did not make him a murderer. If every good samaritan ends up being a potential suspect this country will end up being an indifferent society.

[15] The law governing criminal liability under s 34 of the Penal Code was clearly explained by Hashim Yeop Sani J in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232, that to succeed the prosecution must establish that the criminal act was done in concert pursuant to a pre-arranged plan or arrangement. Since direct evidence is difficult to come by to prove intention much therefore depends on inferences picked up from the acts, conduct or other relevant circumstances of the case. With R2 being out of the appeal the possibility of the prosecution establishing the ingredient of 'furtherance of common intention' was an uphill task. Unless any instruction was forthcoming from R2, if ever there was one, there was absolutely no reason why R1 and R3 would want to kill the deceased. The fact that they rushed the body to the hospital would neutralise any suggestion that they personally wanted him dead. Evidentially there was no direct evidence to show the involvement of R3 in the commission of the said offence as he was never mentioned by PW5 of being in the house. The first time R3 was supposed to have entered the matrix of the case was when he came out of the vehicle helping to send the deceased to the hospital. But this came out of the opening speech and not from the evidence. Apart from that shortcoming unless there was evidence to show he joined the car from the point where the deceased was picked up, he could have joined R1 along the way. So far no conclusive evidence was tendered to establish how he came into the vehicle. Dr B Rajasingam a/l S Balasingam (PW11) who attended to the deceased only recognised R1 but never R3. Without R3 being identified and PW5 never made mention of him the prosecution had absolutely failed to connect him with the murder rap. Common sense will say that without any evidence against

R3, it is hard for the prosecution to prove common intention under s 34 of the Penal Code between him and R1 (*R v Abott* [1955] 1 All ER 899).

[16] A rather interesting facet of this case is that, apart from the failure to call Razbean as a witness, there was obvious failure to call two other material witnesses. The two are Derwati and Fang Shu Jing, former employees who have lived in that very house where the incident was alleged to have taken place. PW5 testified in no uncertain term that he saw Fang Shu Jing in that house on the day of his visit. Fang Shu Jing was charged for an offence and sentenced to ten months jail by the Kuala Lumpur Magistrates Court. She was deported back to China after serving the sentence. Unfortunately, for purposes of this case, the prosecution never made any official request to Kajang Prison to extend her detention before sending her back to China. Derwati was detained in the civil prison from 11 October 2004 (the murder being on 26/27 September 2004) but was never called to give evidence in court. There was no difficulty on the part of the prosecution to produce them for purposes of the hearing eg by extending their stay in Malaysia by some legal processes.

[17] In a word, the failure of the prosecution to call important witness who might have possibly witnessed the murder and unfold the narrative of the prosecution's case, was fatal to the prosecution's case (*Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433). With the failure to call especially these two witnesses, the gap as to what happened on that relevant date was like a gaping wound that became putrid for want of suture and medical attention. There was nothing to prevent R1 and R3 of possibly suggesting that the Chinese lady had a role in committing the homicidal drowning. We had to bear in mind that R1 and R3's burden was only to prove a reasonable doubt and not to prove the truth of any of their allegations (*Mat v Public Prosecutor* [1963] MLJ 262; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; [1991] 3 CLJ 169). An adverse inference therefore must be taken against the prosecution in the circumstances of the case.

[18] From the above, as there was no direct evidence to implicate R1 and R3 with the murder, what was left was rather weak circumstantial evidence (*Kartar Singh & Anor v Rex* [1952] MLJ 85). At best at the prosecution's stage, to reiterate, the evidence adduced was as follows. PW5, two days before the murder came to the house and saw R1, R2, a Chinese lady, and the deceased tied up but still alive. He made no mention of R3. The deceased being tied up was supported by P50 (1–8). Unfortunately as regards this piece of evidence, the prosecution had failed to establish when the deceased's images were taken. Again those images did not establish the murderer or connect R1 and R3 with the murder (except that the mobile telephone was R1's).

[19] The next set of evidence was pertaining to the scene where R1 and (an unidentified) R3 brought the deceased's body to the hospital. Transporting the deceased body to the hospital does not mean that they killed him. That was about all that was produced by the prosecution.

[20] The onus on the prosecution, when the evidence is of a circumstantial nature, is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient (*Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36). There was no evidence to show:

(a) R3 was in that house;

(b) R1 and R3 had abused the deceased;

(c) R1 and R3 tied up the deceased;

(d) R1 and R3 threw the deceased into the water;

(e) the furtherance of common intention had been established; and

(f) R3 was in the vehicle used to send the deceased to the hospital.

[21] We were not satisfied that when the above evidence, taken together, irresistibly led to the conclusion that R1 and R3 committed the offence; or putting it in another way we were not satisfied that the prosecution had proven a prima facie case. The circumstantial evidence in this case presented by the prosecution was of such weak quality that no judge would have called the defence let alone convict him even if the defence was called (*Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307; *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306).

[22] Based on the above reasoning we dismissed the appeal and affirmed the High Court order.

Appeal dismissed.

Reported by Kanesh Sundrum